A chancellor does not wait till noisome trades and unwholesome gases kill somebody before he proceeds to restrain; or that the threatened destruction of pictures, charts, &c., has taken place. His remedy is preventive, and if the tendency of the acts complained of be injurious, so that the injury may be irreparable, he will proceed to prevent them.

Dr. Spencer states his experience of the noises from the defendant's shop, while attending the plaintiff's family, and declares his belief that it greatly interfered with his efforts to relieve his patients, and he gives his belief that it would jeopard the life of a patient, in the crisis of a fever, by preventing rest and sleep. I do not forget the admonition against using the strong arm of the chancellor, but that strength was given, and intended to be used, in proper cases, and I think this is one of them as it now stands before us. What may be made to appear on answer, pleadings, and proofs, if the case comes to that, I do not anticipate nor prejudge; it is of the case, as it is now, that I treat. I am, therefore, of opinion that the defendant should be restrained from using his tin and sheet-iron workshop, as a workshop, until further order of the Court. Let the decree for a preliminary injunction be drawn and entered on the plaintiff's giving bond, with sufficient sureties, in $1000 to the defendant, conditioned to answer in damages, in case of loss by reason of this injunction.

Supreme Court of Indiana, November Term, 1862.

JOHN ROCHE *vs.* FRANCIS WASHINGTON.*

Since the removal of the Miami Tribe of Indians from Indiana, in pursuance of their treaty with the United States in 1840, a marriage between two remaining members of the tribe, according to the native customs, will be held invalid in the courts of Indiana, as contrary to the laws of that State.

Qu. Whether the Indian tribes within the United States are in any case independent civilized nations, so as to require their marriage laws or customs to be recognised in the State Courts.

PERKINS, J.—Suit for partition instituted by Francis Washington

* We are indebted for this case to the kindness of PERKINS, J.

against John Roche. Partition adjudged. Motion for a new trial overruled: commissioners report partition: report confirmed. New trial denied. Appeal to this Court.

The cause was decided upon the following agreed case:—

"It is hereby agreed by the parties to this action, that the following are the facts of the case. The land in question, of which partition is prayed, was the property of Sa-ka-ko-quak, *alias* Jane Richardville, who died seised of the same in 1857, leaving no children, no father nor mother, but leaving her husband, as hereinafter stated, whose name is George Washington, and her sister Catharine Richardville, her brother Suab Richardville, and Francis Washington, the plaintiff, who is an only son of her sister Ah-tah-fe-tah-neah, deceased. It is further agreed that the defendant John Roche has the title of George Washington, Catharine, and Suab Richardville, conveyed to him since the decease of the said Jane Richardville. It is further agreed that all of the foregoing persons, except the defendant, are or were Miami Indians.

"It is further agreed, that in the year 1844 the said George Washington, according to the manner and custom of marriage in said Miami tribe of Indians, was duly married to Se-qua, a Miami Indian, with whom he lived, residing in Huntington county, Indiana, where a portion of the said Miami tribe then and since have resided. That in the year 1846 the said George Washington, and the said Se-qua, according to the manner and custom of divorce in said Miami tribe, were duly divorced. That in the same year 1846 said Se-qua removed to Kansas Territory, where she has since resided and now resides. That afterwards, in the year 1847, said George Washington, according to the custom of said tribe of Indians, was married to the said Ah-tah-fe-tah-neah, who departed this life in 1852, leaving said Francis Washington her only surviving child. That afterwards in 1853, said George Washington, according to the custom of said Indian tribe, was married to said Sa-ka-ko-quak, *alias* Jane Richardville, and that the two lived together and cohabited as man and wife till her death, at the county of Huntington, in 1857, she dying childless.

"It is further agreed, that the Indian custom of marriage re-

quires no ceremony, further than the agreement of the parties to live together as husband and wife, the agreement being consummated by living and cohabiting together as such.

"It is further agreed, that the Indian custom of divorces requires no special form of proceeding other than that the parties disagree, and by consent separate, the mother usually taking care of, and receiving the annual payment of the government to the children; and that the said customs of marriage and divorce are the ancient, immemorially continued, and present existing customs among all of said tribe of Indians, and the law thereof, and that the same have continued to exist as their customs and laws for a period beyond the memory of man."

(Signed,) "J. R. COFFROTH, *Att'y for defendants.*
"S. P. MILLIGAN, *Att'y for plaintiffs.*"

The question intended to be presented for our decision in this cause is, whether the Courts of Indiana will hold valid as marriages such unions, and as divorces such separations as those described in the agreed statement of facts, they having been made under, and being sanctioned by the laws of the Miami tribe of Indians.

It is claimed that by the law of nations, the Courts of Indiana must uphold Indian marriages. The law of nations or international law is mainly of modern origin, growing out of increased commercial and social intercourse, and exists only among civilized States: 1 Kent's Comm. p. 1. It is very properly divided by late writers into public and private. Public, that which regulates the political intercourse of nations with each other. Private, that which regulates the comity of States in giving effect in one to the municipal laws of another relating to private persons, their contracts, &c. The first question to be decided is, then, does a tribe of North American Indians constitute a State? We think not. A State has been defined to be "a people permanently occupying a fixed territory, bound together by common laws, habits, and customs (or by a constitution), into one body politic, exercising through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable

of making war and peace, and of entering into international relations with other communities." See New American Cyclopedia, vol. 10, p. 360; Wheaton's Law of Nations, pp. 53, 54; 1 Kent's Comm. p. 188, 189. But few of the particulars enumerated as constituting a State exist in a tribe of North American Indians. (See, however, the *Cherokee Nation* vs. *Georgia*, 5 Pet. U. S. Rep. 1.) This the Court judicially takes notice of as a matter of general historical knowledge. The Indians are not elevated above the condition of nomadic, pastoral tribes, if up to it. Neither, were these tribes conceded to be States or nations in the political or international sense of the term, are they civilized.

Civilization, it is true, is a term which covers several states of society: it is relative and has not a fixed sense; but in all its applications it is limited to a state of society above that existing among the Indians of whom we are speaking. It implies an improved and progressive condition of the people, living under an organized government, with systematized labor, individual ownership of the soil, individual accumulations of property, humane and somewhat cultivated manners and customs, the institution of the family, with well defined and respected domestic and social relations, institutions of learning, intellectual activity, &c. We know historically that the North American Indians are classed as savages and not as civilized peoples, and that, in fact, it is problematical whether they are susceptible of civilization.

But let it be admitted that the Miami tribe of Indians constitutes an international political state, and that it is a civilized one, still the State of Indiana is not bound by international comity to give effect in her Courts to all the laws and customs of such State: but only to such as are not repugnant to her own laws and policy: *Doe* vs. *Collins*, 1 Ind. 24. Laws, giving effect to contracts of marriage, are not repugnant to the laws or policy of Indiana: and the proposition is established as a general one, in private international law, that an actual marriage, valid in the country where celebrated, will, not as upon a claim of right, but by courtesy, be given effect to in other States, though not celebrated by the forms nor evidenced in the mode prescribed for marriages in such other States. If,

then, in the case at bar, an actual marriage took place between Jane Richardville and George Washington, there could be no objection to its being upheld in the Courts of this State, though celebrated among an uncivilized tribe of Indians.

What, then, constitutes the thing called marriage? What is it in the eye of the *jus gentium?* It is the union of one man and one woman "so long as they both shall live," to the exclusion of all others, by an obligation which, during that time, the parties cannot, of their own volition and act dissolve, but which can be dissolved only by authority of the State. Nothing short of this is a marriage. And nothing short of this is meant, when it is said that marriages, valid where made, will be upheld in other States: *Noel* vs. *Ewing*, 9 Ind. 37; Story's Conflict of Laws, chap. 5; Wheaton's Law of Nations 137: see *Reynolds* vs. *Reynolds*, 3 Allen (Mass.) Rep. p. 605. From what has been said, it is manifest that the union between Jane and George, described in the statement of facts in the case at bar, was not a marriage according to the law of any civilized nation, but simply and exactly a contract and state of concubinage: See Cobb on Slavery 245, note 4: *The State* vs. *Samuel*, 2 Dev. & Bat. (N. C. Rep.) 177.

But, suppose the union had been such as to constitute a marriage according to the *jus gentium*, and which the Courts of this State would have upheld as such, it might not still have followed as a consequence that the husband would have inherited from the wife her real estate. The marriage is one thing, and the incidents, the legal rights and consequences attaching upon the marriage, are another: and these may be different as to real and personal property: 2 Kent, p. 93, *et seq.* Marriage, in different countries, is followed by different property rights. In the Miami nation, or tribe of Indians, marriage, supposing we concede their unions of the sexes to be such, is not followed by a right in either party by the law of the tribe, to inherit real estate from the other; for the Indians, by their laws, neither in their tribal capacities nor individually, owned any real estate. It is a kind of property unknown to them. They simply hold vaguely defined territory for use in hunting, fishing, &c.; and they never assumed to, and could not

convey the fee to any one. That belonged *first* to Great Britain, as the discovering nation, and to the United States afterwards, by succession to Great Britain: and it is under our laws only that any individual among the Indians ever obtained, conveyed, or inherited real estate: See *Fellows* vs. *Denniston*, 23 New York Rep. 420. *The Cherokee Nation* vs. *Georgia*, 5 Peters (U. S.) Rep. 1. This is the doctrine of international law held by civilized States, and acted upon without consulting the Indians. It is based or justified on the ground that the Indians never cultivated the soil.

But the case does not turn on any of the foregoing points, and they need not therefore be regarded as decided. See, on the general subject, *Dole* vs. *Irish*, 2 Barb. 639; *Wall* vs. *Williamson*, 8 Ala. 48; 11 Id. 828, and 10 Id. 630. Also *Jones* vs. *Laney*, 2 Texas 342, and the cases in the Supreme Court of the U. S., cited in Curtis's Digest 240.

A treaty, however, we may remark, may be made between a government and an association of persons not constituting an independent government. The Constitution of the United States authorizes our government to treat with foreign *nations*, and to regulate affairs with *States* and *Indian tribes*.

We know, as a part of the law of the land, and the history of our State, that the last treaty between the Miami tribe of Indians located in Indiana and the United States, was in 1840: that this tribe then agreed to remove from Indiana to west of the Mississippi River: that in 1846 the agreement was executed, the chiefs at that time relinquishing their council fires upon the Wabash, and, accompanied by most of the living members of their tribe, departed for their newly-assigned and distant home. The sovereignty of the tribe, so far as it possessed sovereignty, its jurisdictional power, so far as it possessed such over persons and property in Indiana, disappeared with the light of its council fires, and departed to the new seat of the tribe. Now it is true, as a general proposition, that the laws of a nation are operative only within the limits of the territory over which the jurisdiction of the nation extends. They do not, as a general proposition, follow the individuals of such nation, into the jurisdictional limits of another nation, so as to attach to

acts done in such other nation. Hence, if citizens of Great Britain, of China, or of Africa, contract marriage in Indiana, that contract, to be valid, must conform to the laws of Indiana: 1 Bright's Husband and Wife, p. 8; 1 Greenleaf's Evidence, § 545. For exceptions to the general proposition above stated, see Wheaton's Law of Nations, p. 132, 3d edition.

The marriage in the case at bar was contracted in Indiana between Miami Indians, who did not accompany the tribe to the West, but remained to live among our people; and it was contracted after all territorial jurisdiction of the tribe had ceased in the State, and after the tribe itself, with its government, had disappeared from our borders. The marriage, therefore, was clearly to be tested by the laws of Indiana, certainly so, when it came in question in our own tribunals.

The judgment below is affirmed, with costs.

RECENT ENGLISH DECISIONS.

Vice-Chancellor Wood's Court. December 11, 1862.

GLADSTONE AND OTHERS *vs.* MUSURUS BEY AND OTHERS.

The Court being informed by counsel that one of the defendants was an ambassador duly accredited from a foreign Sovereign to the British Court, will dismiss him from the suit; and will not, if he object, oblige him to plead or take part in any proceedings.

This was a bill filed against Musurus Bey (the Turkish ambassador), the Bank of England, and the Sultan of Turkey, praying (*inter alia*) that an injunction might issue to restrain the defendant (the ambassador) from causing to be paid and delivered, and to restrain the defendants, the Bank of England, from paying over to any person, other than the plaintiffs or their nominees, or except under the direction of this Court, a sum of 20,000*l.* Turkish Bonds, which had been deposited by the plaintiffs with the bank as the security for the performance of a contract to establish a State bank in the Ottoman Empire.